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Book Reviews

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Book Review:

BUREAUCRATIC JUSTICE

Jerry L. Mashaw
Yale University Press
1983

The latest book by Professor Jerry L. Mashaw was written, he says, to satisfy two personal curiosities. The first stated objective is to test the validity of criticisms voiced by Social Security Administrative Law Judges to case management and case development. He couches the second inquiry in the following language: "Is it possible to integrate the normative concerns of administrative law with the positive concerns of organizational theory?"

This second question establishes the tone of the book, which is, primarily, an elaboration of Professor Mashaw's philosophy of administrative law, as applied to the Social Security Administration hearing process. Although subtitled "Managing Social Security Disability Claims," Bureaucratic Justice is more likely to be studied by academic lawyers and theoreticians than by judges or program managers.

The argument constructed by Professor Mashaw is too complex to be fairly summarized here. Even if space permitted, this reviewer (who is not a theoretician) would be ill-suited to analyze a work of abstract jurisprudential theory. Absent a fair statement of Professor Mashaw's position, any criticism of his views necessarily lacks persuasive force. Accordingly, this discussion will be confined to the general observations of an administrative law judge, whose outlook, admittedly, is very different from that of Professor Mashaw.¹

To a lawyer trained in the adversarial system, with its reasonably clear division of responsibility between plaintiff and defendant, judge and jury, the position of a Social Security Judge seems anomalous, at best. The Judge works for, but is independent from, the Social Security Administration. He is the first agency employee to see the claimant face to face. The claimant appears at a hearing, sometimes with counsel, to establish his entitlement to benefits, previously denied him by the agency. Except on a limited, experimental basis, no one appears at the hearing on behalf of the Social Security Administration to support the denial, and the agency's position, on both the law and the facts, must be inferred from the documents alone. The Social Security Judge must act as judge, jury, and prosecutor, and, where the claimant is unrepresented (or under-represented) as defense counsel as well.

This system has been criticized, by Social Security Judges and others, on the grounds that the Judge's impartiality, and the appearance thereof, is necessarily compromised. The dual role of the Judge (as arbiter of fact and advocate for

¹ It is a fair measure of the reviewer's bias that he generally agrees with the thesis advanced by Dean Monroe H. Freedman in Lawyer's Ethics in an Adversary System (Bobbs-Merrill, 1975) and believes it applicable to administrative hearings. The thesis is often seen as advocating an unfettered adversary system.

denial²) and his relationship to the agency itself, are the focal points of most criticism. These arguments have never been answered to the satisfaction of the critics, and, in the opinion of this reviewer, are not adequately answered in Professor Mashaw's book.

Since the system of Social Security adjudication cannot be completely justified within the traditional theoretical framework of a totally impartial Judge, acting in the context of an adversary proceeding, the system must be defended on other grounds. Arguments range from "We've always done it this way and it works" to the need to maximize the effect of lawful policy directives on the ultimate work product of the agency. The principal justifications most frequently used, however, are, in the final analysis, simply variations on the argument of efficiency and expediency.

Bureaucratic Justice reflects an apparent effort to organize the traditional defenses of Social Security adjudication into a logical system grounded in legal theory: in short, a philosophical and legal explanation for the status quo. It is an ambitious project of which more qualified individuals will judge the success. This reviewer is unpersuaded.

Professor Mashaw avers that he chose the Social Security Administration as the basis for his argument principally because it is the agency with which he is most familiar. Neither his expertise on Social Security matters, nor the importance of Social Security adjudication within the framework of Federal administrative law, can be doubted. Nevertheless, the controversial experience of a single, somewhat unique adjudicatory agency seems an inadequate basis for the book's more general conclusions. Judges familiar with formal adversarial administrative trials may well derive from their own experience a philosophy of law more consistent with traditional views of due process trial — a philosophy in which bureaucracy is the servant of justice rather than its partner, master, or alter ego.

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² Of course, those who adhere to the position that Social Security hearings, in theory and in practice, are "non-adversarial" would deny that the Judge is an advocate for any point of view.

BOOK REVIEW:

Causes of Action

Shepard's/McGraw-Hill
P.O. Box 1235
Colorado Springs, CO 80901

Of considerable interest to practicing attorneys is a new series by Shepard's/McGraw-Hill entitled Causes of Action. The series has potential value for administrative practitioners, including administrative law judges.

Causes of Action (cited by the publisher as "COA") is comprised of original articles, fifty to one hundred pages in length, addressed to legal issues of current practical importance. Each article contains a broad outline of the subject, with specific reference to the decisional law of the various states and the Federal courts. Annexed to each article is the text of a sample case. In concept, therefore, COA is strongly reminiscent of West's American Law Reports.

Unlike ALR, however, COA has a distinctly practical orientation. For example, the article "Cause of action by 'at will' employee for wrongful discharge," 1 COA 273, begins with a statement of the available actions (tort or contract), the elements of a prima facie case under each theory, the identity of the persons liable (the employer, and in certain circumstances, fellow employees) and the damages recoverable — all compressed into two hundred words. The text of the article (which follows a table of contents and descriptive word index) is divided into an introduction (Sec. 1 Scope, Sec. 2 Alternate Legal Actions), a substantive law overview (in which contract and tort actions are treated seriatim, describing for each cause of action the legal background, the requisite proof, and the available defenses), a practice and procedure section, and an appendix (consisting of the sample case, a sample pleading, and a research guide). The article concludes with a table of cases.

The wrongful discharge article does not contain footnotes. Rather, important collateral and developmental points are treated in extremely useful "Practice Guides" liberally interspersed with the text.

As might be expected, the article contains numerous cross-references and other research aids. Its organization is typical of the ten articles which comprise the first volume of COA.

COA is not limited to judicial causes of action. An article "Recovery under Workers' Compensation statute for mental disorder caused by work connected stress without physical cause or result," 1 COA 75, undertakes to treat, with appropriate cautions, both the substantive law and the important procedural issues which arise under the divergent provisions of state administrative practice. Other articles touch upon products liability (brake defects and pharmaceuticals), psychiatric malpractice, false arrest of suspected shoplifters, refusal of insurers to negotiate in good faith, tax refund cases, discrimination in lending, and a cause of action under 15 USC 1988, 1989, which requires sellers of motor vehicles to provide the purchaser with information concerning the vehicle's actual mileage.

Where a cause of action has its basis in a statute, the text of the statute, and the relevant administrative regulations are reprinted in the article itself in order to expedite research. The series has other helpful features, including reprints from Shepard's Citators.

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It would be unfair to compare COA to the highly regarded first series of American Law Reports. Deep scholarship and long reflection are increasingly rare in the competitive world of commercial legal printing. If COA is more encyclopedic than profound, it is generally well written, and far more readable than some of its modern counterparts. Its practical approach is, in the view of this reader, successful. These virtues, when coupled with the appropriate selection of topics included in the first volume, make COA a series well worth examining.

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Past President Paul Wyler of California has brought to the attention of the Journal the case of Norman v. Unemployment Insurance Appeals Board, 83 Daily Journal D.A.R. 1516, dec. June 6, 1983. The California Supreme Court held that the voluntary termination of one's employment in order to follow a nonmarital "loved one" (the plaintiff's live-in boyfriend) to another location does not constitute "good cause" for purposes of determining eligibility to receive unemployment compensation benefits. Judge Wyler reports that California's chances of falling into the ocean are not affected by this decision.